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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949,

LARRY GARA,
Petitioner and Appellant-Defendant Below,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee-Plaintiff Below.

BRIEF AMICUS CURIAE OF THE OHIO PASTORS CONVENTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949,

No. 609.

LARRY GARA,
Petitioner and Appellant-Defendant Below,
vs.

UNITED STATES OF AMERICA,
Respondent and Appellee-Plaintiff Below.

BRIEF AMICUS CURIAE OF THE OHIO PASTORS CONVENTION.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

IDENTITY OF AMICUS CURIAE.

The amicus curiae filing this brief is the Ohio Pastors Convention.

In February, 1950, 2,000 protestant ministers whose churches are members of the Ohio Council of Churches,

met for the annual Ohio Pastors Convention at Columbus. The convention adopted a resolution authorizing this brief. This resolution appears in the appendix to this brief.

Great numbers of Christian ministers today are profoundly concerned about what appears to them, in this decision of the Court of Appeals, to be a deeply serious abridgment of that which they believe to be one of their most inalienable rights as Christian ministers, namely, the right to counsel lay members of their churches and fellowships to adhere to the decisions of the individual conscience.

II.

STATEMENT OF MATTERS INVOLVED.

The petitioner Larry Gara was convicted of counseling, aiding, or abetting a student who refused to answer some draft questions and sign a draft card. He counseled his student to "stand by his convictions". Gara was dean of men at Bluffton College and administered his counsel in that capacity. Members of the organization filing this brief stand in the shoes of Gara because they also are professional counselors to young people as ministers.

III.

REASONS FOR ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals for the Sixth Circuit upheld the constitutionality of Section 462(a) of the Selective Service Act of 1948 which, as interpreted by the lower courts, prohibits mere speech

advocating following conscience when conscience dictates refusal to register, even in the absence of clear and present danger to the state. The constitutionality of Section 462(a) restricting speech involves an important question of federal law which has not been, but should be, settled by this court. Text of the section appears in the appendix.

B. The decision of the Circuit Court of Appeals holding that the presence of "clear and present danger" was determinative by the Congress of the United States is a decision of law in conflict with decisions of this court holding such to be a judicial yardstick.

C. The decision of the Circuit Court in abandoning the "clear and present danger" test to the legislature so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

D. The opinion of the Circuit Court is based upon evidence of acts not charged in the indictment, irrelevant to the acts charged and erroneously admitted as evidence of intent.

IV.

THE QUESTION PRESENTED.

Is Section 12(a) [50 U. S. C. App., 462(a)] of the Selective Service Act of 1948 as interpreted below unconstitutional as violative of the First Amendment?

Amicus curiae believes that it is.

V.

ARGUMENT.

1. Section 462(a) of the Selective Service Act as interpreted is unconstitutional because in express terms it flatly restricts freedom of speech and freedom to advocate religious beliefs in the absence of a "clear and present danger" to the state.

2. The finding of the existence of a clear and present danger is a rule of law which may not be abandoned to Congress under the constitutional division of powers among the three branches of government.

1. The statement for which Gara was convicted took place on the campus of Bluffton College in conversation with a student. When an FBI agent and a deputy sheriff came to arrest the student (Charles Ray Rickert) because he had not registered, Gara appeared and said, "Stand by your convictions. Don't let them coerce you into registering" or words to the same effect. There had been previous consultations between Gara as dean of men and the student at this Mennonite college and the advice was of similar purport—to wit, that the student should follow his conscience, even though it told him not to register.

The effect of Section 462(a) as applied in this case by the Circuit Court of Appeals is to prohibit individual religious counsel to adhere to the promptings of conscience, when that conscience conflicts with the military draft. It puts the state above God, a source of trouble since time immemorial. Section 462(a) provokes this conflict unnecessarily and under circumstances devoid of any clear and present danger to the state. As the

Supreme Court of the United States said in **Girouard v. United States,** 328 U. S., 61, 68-9:

> "Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the state. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in **United States v. Ballard,** 322 U. S., 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. **Board of Education v. Barnette,** 319 U. S., 624.'"

The overt counseling in the Gara case was mild compared to the incitations to violence of **Terminello v. Chicago,** 337 U. S., 1. Terminello's speech was held to be protected. Gara's acts were milder than the circumstances in **DeJonge v. Oregon,** 299 U. S., 353 (1937). The law of this case, we contend, should have been followed in **United States v. Gara.** This court with Chief Justice Hughes writing the opinion reversed the conviction of DeJonge. He was convicted of the violation of the Criminal Syndicalism Law of Oregon. The act defined "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution". DeJonge had presided at a Communist party meeting attended by about 225 persons.

Apropos of the right to peaceably assemble, and freedom of speech and the press, the United States Supreme Court said on page 364 of this opinion:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights

> themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our constitutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
>
> "It follows from these considerations that, consistent with the Federal Constitution, peaceable assembly for lawful discussions cannot be made a crime. The holding of meetings for peaceable political action cannot be prescribed. * * *."

Under the foregoing statement of the law in **DeJonge v. Oregon**, the speech and counsel of Gara was protected by the First Amendment. The indictment against Gara read:

> "Or about the eighth day of November, 1948, at Buffton, in the Northern District of Ohio, Western Division, Larry Gara knowingy counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948."

The operative fact was simply that, on November 8, 1948, when an FBI agent and deputy sheriff arrested Rickert on a warrant for having refused to register two months previous, Gara said to him, "Stand by your principles. Don't let them coerce you into registering."

The speaking of those words was the alleged crime.

There was no mass meeting, there was no incitation to violence. There was merely counsel from an older man, who had known at first hand the hardships of im-

prisonment for conscience, to a young student; that he should obey his conscience, submitting if need be to civil penalties for actions conscientiously dictated.

It may be here said that the vice of the trial, the conviction and the affirmance by the Circuit Court (178 F. (2d), 38) was that Gara was tried for and convicted of, not uttering the foregoing remarks on the date charged in the indictment, but of entirely separate and distinct actions at different times and places from those charged.

Masquerading as evidence of his intent, in speaking the words on which the charge was based, proof was admitted of actions, documents and evidence entirely unrelated to the matter charged. These extraneous matters occupied most of the trial, most of the prosecutor's argument to the jury, most of his brief to the Circuit Court and most of the opinion of that court. Prejudicial evidence and argument were imported into the case: (1) that Gara made a speech advocating refusal to register. This speech was in Reading, Pa., not Bluffton, Ohio. It was in August, not on or about November 8, 1948; (2) that Gara had written letters stating that he had advocated refusal to register. These letters were not addressed to or even proved to have been seen by Charles Ray Rickert. In fact they were addressed to various public officials in protest against their official acts.

The weight to be accorded the freedoms of speech and religion has been variously stated in recent cases. In **Thomas v. Collins**, 323 U. S., 516, 530, they were said to occupy a "preferred place" balancing "the usual presumption supporting legislation".

Again it has been said:

> "* * * without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be

> enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. **Kovacs v. Cooper**, 93 L. Ed. Adv., 391."

In this case, however, it is hardly necessary to seek any "preferred place" or special "momentum for respect" in balancing the rights protected by the First Amendment against any clear and present danger to the state. Here we seek no special exemption on the ground of conscience for those who refuse to register as Rickert did. All **amicus curiae** seek is the right to say that one should act conscientiously even though the results may include inconvenience, hardship, sacrifice, or civil penalty. To make that statement presents no danger that is both clear and present. Thus as applied to Gara Section 462(a) is clearly invalid. It falls within not only the opinion of the majority of the court in **West Virginia State Board of Education v. Barnette**, 319 U. S., 624, but also within the prohibitions of the dissent. It is, in fact, a disguised assault upon dissident views, 319 U. S., 653, a statute whose intrinsic legislative purpose is to discourage a particular religious creed. It therefore is "within the constitutional restrictions imposed on legislatures and cannot stand". 319 U. S., 651.

2. **The finding of the existence of a "clear and present danger" is a rule of law which may not be abandoned to Congress under the constitutional division of powers.**

Transcending the harm to Gara, the Circuit Court of Appeals abandoned to the legislative branch of government the right to determine when a clear and present

danger to the state existed when it held in the Gara opinion "On the question of whether a clear and present danger existed, requiring the enactment of the statute, the Congress is the judge." (178 F. (2d), 38, 41.) This is subversive of the division of powers in the government. Clear and present danger is a judicial yardstick formulated by Associate Justice Oliver Wendell Holmes in **Shenck v. The United States**, 294 U. S., 47 (1919). The judicial yardstick of clear and present danger set a limitation upon the freedoms guaranteed under the First Amendment yet it demarked an area of lawful speech. Abandonment of the yardstick to the legislature would deprive the courts of the tool by which it protects the First Amendment.

Thus:

> "• • • judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. **Thomas v. Collins**, 323 U. S., 516, 531-2."

Respectfully submitted,

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APPENDIX.

The resolution adopted at the February, 1950, annual Ohio Pastors Convention at Columbus, Ohio, was as follows:

> "We express our sympathetic concern in the Gara case inasmuch as it involves basic rights of American citizenship. We pledge our moral support of those religious groups who are seeking justice in this particular case.
>
> And because of its far reaching implications to all of us as Christian ministers, we urge that the United States Supreme Court consider this case, and that the Public Affairs Committee of the Ohio Council of Churches be requested to communicate this action to the United States Supreme Court in the most effective manner."

The 50 U. S. C. App., 462(a) in its material portions reads as follows:

> "Any * * * person * * * who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction * * * be punished by imprisonment * * * or a fine * * * or by both such fine and imprisonment * * *."

FILED
MAR 8 1950
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

October Term, 1949.

No. [redacted] 19

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AS FRIEND OF THE COURT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 609.

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AS FRIEND OF THE COURT.

American Friends Service Committee, Inc., is a non-profit corporation. It is an agency of the several branches of the Religious Society of Friends (Quakers) in the United States conducting religious, philanthropic and relief work in the United States and foreign countries. Eight days before the Selective Service Act of 1948 became a law, the American Friends Service Committee issued the following:

"MESSAGE TO OUR FELLOW AMERICANS

"'I told them I knew from whence all wars arose . . . and that I lived in the virtue of that life and power that took away the occasion of all wars. . . .'

—GEORGE FOX (Founder of the Society of Friends), 1650.

"For three hundred years the Society of Friends has striven to maintain this testimony of its founder. The American Friends Service Committee had its first beginnings in an effort to provide opportunities for young men who in the midst of World War I opposed war and sought to live 'in that life and power'. It has now had more than thirty years of experience in this form of religious service. By offering opportunity for a wide range of services at home and abroad it has sought to release those forces in the world that prevent war. This it will continue to do.

"We of the Committee do not hold this position merely because it has been held in the past; it depends upon our conception of God and of God's relation to man, and upon our belief that no plea of necessity or of policy, however urgent or peculiar, can avail to release either individuals or nations from the paramount allegiance which they owe to Him who hath said, 'Love your enemies'.

"It is a grave responsibility to stand before a world which relies on military force and to assert that such reliance can never lead to creative peace. But, faced with the possibility of conscription for military service, we feel an obligation now, in peacetime, to make our opposition to conscription a matter of record with our government and with our fellow citizens.

"Moreover, we stand ready to offer our ministry of aid and counsel to all who for religious or conscientious reasons stand opposed to conscription and war. We recognize that their opposition might take such forms as non-compliance with the law; counseling non-compliance with the law; choosing non-combatant or alternative civilian service; insisting on using their technical knowledge for constructive rather than destructive purposes.

"In taking this position we believe that we can best live out our highest responsibilities as citizens of our country. We believe that the power of such a way of life might set our country on a new course of understanding among all peoples. Such a way awaits only the devotion of consecrated men and women. This call we make to our fellow citizens.

"June 16, 1948."

By reason of the long-established principles of the Religious Society of Friends relative to the issues of war and military service, members of this Committee are impelled to continue to offer a ministry of aid and counsel to all who for religious or conscientious reasons stand opposed to conscription and war. We recognize now as in 1948 that their opposition may take such forms as non-compliance with the law or supporting on conscientious grounds those whose loyalty to God's will as revealed to them has led them to refuse to register for military service.

This Committee is deeply concerned with this case on two grounds. It is concerned to support the petitioner, a member of the Religious Society of Friends, who for religious and conscientious reasons has supported a non-registrant in placing loyalty to God above his duty to register under the Selective Service Act.

But the Committee is far more concerned with the bearing of this case on the broad issues of religious freedom. If this decision is the law of the land, many members of the Religious Society of Friends and others who place their duty to God above their duty to the State, are made violators of the law, subject to fine and imprisonment unless they betray their deepest religious faith and convictions.

It is of some significance that out of the sixty-six young men who have been convicted for failure to register under the Selective Service Act of 1948 thirty-seven are members of the Religious Society of Friends, fourteen are members of other Protestant denominations and less than ten are

those who would be usually classed as "political" or "humanitarian" objectors.

We believe it is important for the Supreme Court of the United States to pass upon the issues of religious freedom involved in this case and to determine whether or under what circumstances it can be made a criminal offense in the United States to counsel others that it is right to obey God rather than man.

(1) Among the questions to be decided is whether a mere refusal to register is an offense under the Selective Service Act of 1948. The United States Court of Appeals for the Second Circuit has held that it is not an offense merely to refuse to sign the registration card, in view of the fact that the Selective Service Regulations provide that if a man appears but "is unable or refuses to sign" the registration card the registrar shall sign for him and consider him registered (Regulation 613.13 (c)).

United States v. Norton decided January 19, 1950, and not yet reported.

Upon this basis the ruling of the lower courts that Ricket's non-registration in the case at bar was a continuing offense is error and would require a reversal of the judgment.

(2) Another important question is whether under an indictment charging counseling a named individual not to register evidence may be introduced, as it was here, of statements and letters written by the defendant, without showing that the non-registrant ever knew of such statements and letters.

(3) A third important question is whether the lower courts were in error in holding that the defendant was guilty if his words "would have a tendency to cause a refusal of duty as required by the Act" (R 167) even if they had no such effect.

(4) A fourth question of even greater import is whether a restriction on religious liberty such as is here involved is constitutional in the absence of evidence of any clear and present danger.

For these reasons we earnestly hope that certiorari may be granted.

Counsel for both parties have consented to the filing of this brief.

AMERICAN FRIENDS SERVICE COMMITTEE, INC.,

By CLAUDE C. SMITH,

HAROLD EVANS,
Both of the Pennsylvania Bar,
Its Attorneys.

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MAY — 8 1950

IN THE

Supreme Court of the United States

October Term, 1949.

No. 69

LARRY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

On Writ of Certiorari to the United States Circuit Court of Appeals
for the Ninth Circuit.

MOTION FOR LEAVE TO FILE A
BRIEF IN BEHALF OF
THE AMERICAN FEDERATION OF LABOR AND
CIO,
AMICUS CURIAE.

CHARLES C. SMITH,
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IN THE

Supreme Court of the United States.

October Term, 1949.

No. 609.

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AMICUS CURIAE.

American Friends Service Committee, Inc., is a non-profit corporation. It is an agency of the several branches of the Religious Society of Friends (Quakers) in the United States aiding and conducting religious, philanthropic and relief work in the United States and foreign countries. The nature of this Committee's interest in this case is set forth in the brief filed by this Committee as *amicus curiae* on the Petition for Writ of Certiorari.

Certiorari was granted April 3, 1950. The Solicitor General on April 11, 1950, declined to consent to the filing of a brief on the merits by this Committee *amicus curiae*. The petitioner has consented.

This Committee is deeply concerned with this case on two grounds. It is concerned to support the petitioner, a member of the Religious Society of Friends, who for religious and conscientious reasons has supported a non-registrant in placing loyalty to God above his duty to register under the Selective Service Act.

But this Committee is far more concerned with the bearing of this case on the broad issues of religious freedom. If this decision is the law of the land, many members of the Religious Society of Friends and others who place their duty to God above their duty to the State, are made violators of the law, subject to fine and imprisonment unless they betray their deepest religious faith and convictions.

We believe it is important that the issues of religious freedom involved in this case be fully presented so that this Court may determine whether or under what circumstances it can be made a criminal offense in the United States to counsel others that it is right to obey God rather than man.

(1) Among the questions to be decided is whether a mere refusal to register is an offense under the Selective Service Act of 1948. The United States Court of Appeals for the Second Circuit has held that it is not an offense merely to refuse to sign the registration card, in view of the fact that the Selective Service Regulations provide that if a man appears but "is unable or refuses to sign" the registration card the registrar shall sign for him and consider him registered (Regulation 613.13 (c)). *United States v. Norton,* 179 F. 2d 527.

Upon this basis the ruling of the lower courts that Rickert's non-registration in the case at bar was a continuing offense is error and would require a reversal of the judgment.

(2) Another important question is whether under an indictment charging counseling a named individual not to register evidence may be introduced, as it was here, of statements and letters written by the defendant, without showing that the non-registrant ever knew of such statements and letters.

(3) A third important question is whether the lower courts were in error in holding that the defendant was

guilty if his words "would have a tendency to cause a refusal of duty as required by the Act" (R 167) even if they had no such effect.

(4) A fourth question of even greater import is whether a restriction on religious liberty such as is here involved is constitutional in the absence of evidence of any clear and present danger.

These are grave issues. They vitally affect this Committee and the Religious Society of Friends. We believe this Court deserves to have these issues fully presented, and that we are likely to present the broad issues of religious liberty more fully and objectively than petitioner.

We earnestly request permission to file a brief on the merits as *amicus curiae*.

AMERICAN FRIENDS SERVICE COMMITTEE, INC.,

By CLAUDE C. SMITH,
HAROLD EVANS,
Both of the Pennsylvania Bar,
Its Attorneys.